BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANITA L. CLARK	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,055,442
COLLEGE HILL NURSING	)	
Respondent	)	
AND	)	
	)	
PENNSYLVANIA MANUFACTURERS ASSOCIATION	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the October 18, 2011[1] Order Nunc Pro Tunc entered by Administrative Law Judge Thomas Klein.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's request for authorized medical treatment or change of physician, finding more persuasive the opinion of his own Independent Medical Examiner, Dr. Vito Carabetta, on the issue of causation.

The claimant requests review of the ALJ's Order. Claimant argues that the Order should be reversed and the Board find that claimant's injury arose out of and in the course of her employment with respondent. Claimant's K-WC E-1 Application For Hearing filed on April 13, 2011, claims a date of accident of July, 2010, and each working day thereafter.

Respondent argues that the ALJ's Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

[1] The first order was issued October 7, 2011. No reason was given for issuing the Nunc Pro Tunc..

Claimant began working for respondent in September 2009. Her last day worked was April 12, 2011. Claimant's job was as a dietary aide/cook. She was responsible for loading carts with the resident's meals, setting the tables, and cleaning up after meals. Claimant testified that she did a lot of bending, lifting and pushing for her job. Claimant is 5 foot 11 inches tall, weighs 114 pounds and often had to lift items above her head.

Claimant testified that she had to lift a lot of 10 gallon containers of ice tea and water and cases of canned goods, frozen vegetables, meats and dishes, bags of sugar and racks of dishes. All of those items were put on a cart and taken to the proper locations to prepare for mealtime. The weight of those items varied from 10-15 pounds. This lifting activity was done twice a day during her shift. Claimant also had to lift a trash can above waist level at least twice a day. Claimant testified that the fully loaded carts were difficult to move and that pushing them is what caused her back to hurt.

Claimant testified that she didn't have any problems with her low back before she began working for respondent. She first recalled having pain in her low back that she related to her work in January of 2010.[2] She testified that she began to feel pressure in her lower back and the problem progressively worsened through July 2010. In September 2010, claimant went to see her personal physician, Dr. Jennifer Morrison, and an MRI was ordered. Claimant contends that she reported her back problems to Dr. Morrison early in 2010, so she doesn't know why those complaints were not in her medical records before the September 10, 2010 report. There is no mention in the September report that claimant's back pain was work-related.

Claimant met with Dr. Pedro Murati on May 23, 2011 for an IME, at the request of her attorney. She had complaints of sharp pain in the lower back, trouble bending and lifting, trouble sleeping on occasion, inability to garden and she had to stand slowly. Dr. Murati examined claimant and opined she suffered from low back pain with signs and symptoms of radiculopathy, and left SI joint dysfunction. He opined that this diagnosis was, within a reasonable degree of medical probability, a direct result of the work-related injury that occurred in July 2010 and EWDT (This is not explained in Dr. Murati's report). He went on to assign temporary restrictions based upon an 8-hour workday of no bending, crouching, stooping or crawling, no lifting, carrying, pushing or pulling more than 20 pounds, occasionally and 10 pounds frequently, occasionally sit or drive, alternate sitting and frequently alternate standing and walking.[3]

Dr. Murati recommended the following treatment options: For the low back pain, Dr. Murati recommended a bilateral lower extremity and lumbar paraspinals NCS/EMG to evaluate for radiculopathy. Based upon the results, he would recommend physical therapy, anti-inflammatory and pain medications as needed, and continuation of the lumbar epidural steroid injections. A surgical evaluation may be required if conservative treatment failed.

---

[2] P.H. Trans. at 8.

[3] P.H. Trans., Cl. Ex. 1 at 3 (Dr. Murati's May 23, 2011 IME report).

For the left SI joint dysfunction, he recommended cortisone injections. The use of an SI belt and/or gait training along with anti-inflammatory and pain medications were recommended, "as needed".[4]

Claimant met with Dr. Vito Carabetta for an IME on August 11, 2011. Claimant's chief complaint was low back pain. She reported that lifting increased her back pain. Dr. Carabetta noted that claimant could not recall a specific incident in the workplace that initiated her symptoms. Claimant testified that Dr. Carabetta told her it was not necessary to go into any kind of detail about the lifting activities she performed for her job.

Dr. Carabetta diagnosed claimant with lumbar degenerative disk disease. He opined that causation on an industrial basis had not been proven. However, aggravation of an underlying condition could be considered. In his opinion, the development of her complaints may be more related to being in the right age bracket rather than to any specific issues in the workplace.[5] He opined that claimant might want to consider steroid epidural injections. She should avoid repetitive bending, stooping activities and lifting more than 40 pounds.[6] Claimant testified that she has no problem following Dr. Carabetta's restriction of no lifting over 40 pounds, because she is not able to anyway.

Claimant testified that her job with respondent was different than the job she previously had as a cook with USD 259 because the school job was lighter and she had help. Whereas, the job with respondent was not light and she didn't have help. Claimant is currently not working and has not applied for unemployment benefits.

Claimant testified at the preliminary hearing that, despite physical therapy[7], her back pain is worse than when she last worked for respondent.

> Q. The record shows that you stated to the doctor that it hurts particularly bad when she is bending over. What was the bending over that you were doing at that time? In September 10, 2010.
>
> A. It had to -- I'm not -- I'm not sure.
>
> Q. Well, was there anything outside of work that you were doing at that time that required you to bend over?
>
> MR. SCHAEFER: Objection, leading.

---

[4] *Id.*

[5] Claimant was 50 years old at the time of her May 23, 2011 examination by Dr. Murati.

[6] *Id.*, Resp. Ex. 1 at 4 (Dr. Carabetta's Aug. 11, 2011 IME report).

[7] These sessions were not paid under workers compensation.

A. No. No more than my daily living; it's --[8]

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[9]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[10]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[11]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[12]

The ALJ denied claimant's request for medical benefits and for a change of physician, noting that the denial was due to "causation". The ALJ found the opinion of the court's own Independent Medical Examiner, Dr. Carabetta to be more persuasive than claimant and her expert, Dr. Murati. It is significant that claimant's condition appeared to actually worsen since leaving respondent. Additionally, at the preliminary hearing, when asked what bending caused her problems, claimant only discussed lifting a case of bottled water once a month.

---

[8] P.H. Trans. at 39-40.

[9] K.S.A. 44-501 and K.S.A. 44-508(g).

[10] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[11] K.S.A. 44-501(a).

[12] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

Her answer was more focused upon her "daily living", rather than her work.[13] This appears to support Dr. Carabetta's opinion that claimant's complaints are more related to her age bracket and underlying degenerative changes, rather than her work.[14]

This Board Member finds that claimant has failed to prove that her ongoing complaints are related to her employment with respondent. The denial of benefits in this matter is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The undersigned Board Member concludes that the denial of benefits in this matter should be affirmed as claimant has failed to prove that her ongoing complaints are due to an injury or injuries that arose out of and in the course of her employment with respondent.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order Nunc Pro Tunc of Administrative Law Judge Thomas Klein dated October 18, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2011.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

---

[13] P.H. Trans. at 40.

[14] *Id.*, Resp. Ex. 1 at 4 (Dr. Carabetta's August 11, 2011).

[15] K.S.A. 44-534a.